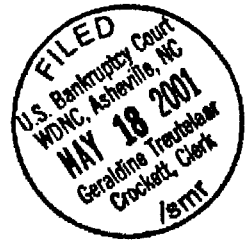


UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
BRYSON CITY DIVISION



In re:

District Memorial Hospital of)
Southwestern North Carolina, Inc.,)
Debtor.)

Case No. 00-20069
Chapter 11

JUDGEMENT ENTERED ON MAY 18 2001

AMENDED ORDER GRANTING CITICORP AN UNSECURED CLAIM PURSUANT TO 11
U.S.C. §§ 502(g) and 365(g); ADMINISTRATIVE CLAIM PURSUANT TO 11
U.S.C. §§ 365(d)(10) and 503(b)(1)(A); ATTORNEY'S FEES PURSUANT
TO 11 U.S.C. §365(d)(10)

This matter is before the court on the motion of Citicorp Vendor Finance, Inc. for allowance and payment of administrative expenses and attorney's fees pursuant to 11 U.S.C. §§ 503(b)(1)(A) and 365(d)(10) and Citicorp's motion for allowance and payment of an unsecured claim pursuant to 11 U.S.C. §§ 502(g) and 365(g).¹

The court entered an initial Order on April 26, 2001. In Paragraph 24 of that Order, the court allowed the parties fifteen days from the entry of that Order to submit supplemental calculations computing the amounts due for the claims in this matter. Citicorp has tendered a timely submission to the court in this regard. After considering Citicorp's submission, the

¹ Citicorp was formerly known as Copelco Capital, Inc. The debtor entered into the lease transactions with Copelco Capital Inc., but Copelco eventually became Citicorp Vender Finance, Inc. This Order will refer to the lessor as Citicorp.

court enters this Amended Order and finds and concludes as follows:

Factual Background

1. The debtor filed a petition for relief under Chapter 11 of the United States Bankruptcy Code on June 6, 2000. The debtor continues to operate it's business as a debtor-in-possession pursuant to Section 1107 and no trustee has been appointed.

2. Prior to the debtor's Chapter 11 filing, it entered into four separate transactions with Citicorp to lease different types of medical equipment. The specific leases and subjects of the leases are as follows:

a) On June 27, 1996, the debtor and Citicorp entered into the First Master Lease Agreement. Pursuant to its terms, the First Master Lease Agreement applied to Citicorp's lease to the debtor of equipment described in any equipment schedules that the parties subsequently executed. On August 1, 1996, the debtor and Citicorp executed two equipment schedules. The First Equipment Schedule, Number 0709860, described the equipment Citicorp leased to the debtor as a ureterscope light with accessories, and a telephone system with accessories. The Second Equipment Schedule, Number 0709861, described additional leased equipment as Allied Healthcare cardio products, Medgraphics products, and a CO-Oximeter analyzer and televisions.

b) On April 29, 1997, the debtor and Citicorp executed the Second Master Lease Agreement. Under this lease, Citicorp leased to the debtor a CP hematology analyzer, printer and data manager.

c) On June 9, 1999, the debtor and Citicorp executed the Third Master Lease Agreement, Number 0943180. Under this lease, Citicorp leased to debtor a laparoscope, surgical light, urterscope, speaker phones, and accessories.

3. The four leases required monthly payments of the following amounts:

a) Equipment Schedule One to the First Master Lease Agreement: \$952.20 due on the first of each month.

b) Equipment Schedule Two to the Second Master Lease Agreement: \$2,917.25 due on the first of each month.

c) Master Lease Agreement Two: \$918.46 due on the first of each month .

d) Master Lease Agreement Three: \$715.12 due on the ninth of each month.

4. Pursuant to paragraphs 5.C. of the First Master Lease Agreement and Paragraph 13 of the Second and Third Master Lease Agreements, the debtor agreed to payment for the reasonable attorneys fees of Citicorp if Citicorp incurred expenses in the enforcement its rights under the leases.

5. The debtor employs Michael Daikan as a hospital administrator. In Daikan's capacity as hospital administrator, and previously as chief financial officer, he was aware that the debtor used some of the leased Citicorp equipment after the debtor filed its Chapter 11 bankruptcy petition and before the rejection of the equipment leases on November 8, 2000. He specifically testified that the debtor used the following equipment that was leased from Citicorp subsequent to the Chapter 11 bankruptcy petition filing date:

a) Lease Number 0709860: One Atlas KSX DSU telephone system;

b) Lease No. 0709861: Seven Zenith televisions, Model #H203 and Nineteen Zenith televisions Model #H195;

c) Lease No. 0943180: the laprascope, CFWP ceiling surgical light, and One Atlas KSU Tie ET 36D speaker phone and accessories.

6. Daikan testified that he knew nothing about Citicorp's lease numbered 0761140 and had not seen the lease until it was shown to him while testifying at this hearing.

7. Before the hearing on this matter, Daikan reviewed the purchase orders and invoice price of each of the items the debtor leased from Citicorp. He did this to determine how much each piece of equipment was worth as a proportion of the entire value

of all the leased equipment in each lease. The following values were established at the hearing on this matter:

a) Lease Number 0709860: \$24,410.20 -- representing the value of the equipment from this lease that was used after the bankruptcy petition was filed as a proportion of the value of all the equipment in this lease. Daikan divided this figure by 60 months (the duration of the lease), concluding that \$390.17 of the total amount due under this lease per month (or \$13.01 per day) was attributable to the equipment used after the Chapter 11 petition was filed.

b) Lease Number 0709861: \$7,500.00 - - representing the value of the equipment from this lease that was used after the bankruptcy petition was filed as a proportion of the value of all the equipment in this lease. Daikan also divided this figure by 60 months and concluded that \$152.62 of the total amount due under the lease per month (or \$5.09 per day) was attributable to the equipment used after the Chapter 11 petition was filed.

c) Lease Number 0943180: \$705.35 -- representing the value, per month, of the equipment from this lease that was used after the bankruptcy petition was filed. When this figure is divided over the period of one month, this leased equipment cost \$23.51 per day.

8. Section 365(d)(10) gives the debtor sixty days from the filing of the Chapter 11 petition to assume or reject the

Citicorp leases. This sixty day period expired on August 4, 2000. The debtor rejected the four Citicorp leases on November 8, 2000 and Citicorp recovered the rejected lease equipment sometime during the third week of November, 2000. The period of time between August 4, 2000 and November 8, 2000, is ninety-six days.

9. Citicorp filed the instant motion and its October 2, 2000 Proof of Claim and February 6, 2001 Amended Proof of Claim alleging an entitlement to several different claims. Specifically, Citicorp sought:

a) an unsecured, non-priority claim for the pre-petition lease arrearage the debtor owed under the terms of its lease pursuant to Section 365(g) and Section 502(g);

b) an administrative claim for some of the unpaid post-petition rent due after the debtor's filing of the case until rejection of the leases. This argument rested on Section 503(b)(1)(A), on the theory that the debtor continued to use some of the leased equipment in its business operations after the filing of its case on June 6, 2000 and until Citicorp recovered its equipment following the court's November 8, 2000 Order rejecting the leases;

c) an administrative claim chargeable against the debtor's estate under Section 365(d)(10) as the sum of the rent it was owed from the debtor under the five leases from August 6, 2000 to

November 8, 2000 -- the period of time following the sixty day abeyance period of Section 365(d)(10) until the day the leases were rejected; and

d) reasonable attorney's fees in the amount of \$5,427.45 as expenses incurred in the enforcement of its rights under its leases. Citicorp further contends that it's total entitlement to attorneys fees has two components: Citicorp incurred \$1,878.52 of legal services enforcing its rights under the leases following the debtor's bankruptcy petition but before the beginning of the "60+" period. These dates are from June 6, 2000 until August 4, 2000. Citicorp also claims legal fees of \$3,548.93 for enforcing its rights under its leases during the period in which Section 365(d)(10) obligated the debtor to perform timely all obligations under its leases. This period was from August 4, 2000 until November 8, 2000.

Discussion

A. Citicorp's administrative expense claim for preserving the bankruptcy estate

10. Citicorp contends that it is entitled to an administrative claim under Section 503(b)(1)(A) for the post-petition benefit that some of its leased equipment conferred on the bankruptcy estate from June 6, 2000, the date of the petition, until August 4, 2000, the fifty-ninth post-petition day.

11. Section 503(b)(1)(A) reads in relevant part that administrative expenses include "the actual, necessary costs and expenses of preserving the estate." Since there is a general presumption in bankruptcy cases that all of a debtor's limited resources will be equally distributed among creditors, bankruptcy courts must narrowly construe Section 503(b)(1)(A). See In re Merry-Go-Round Enter. Inc., 180 F.3d 149, 157 (4th Cir. 1999). Accordingly, the Fourth Circuit has articulated a specific, two-part test to determine whether a claim qualifies for administrative expense treatment: (1) the claim must arise out of a post-petition transaction between the creditor and the debtor-in-possession (or the trustee) and (2) the consideration supporting the claimant's right to payment must be supplied to and beneficial to the debtor-in-possession in the operation of the business. See In re Stewart Foods Inc., 64 F.3d 141, 145 n.2 (4th Cir. 1995) (citing Trustees of Amalgamated Ins. Fund v. McFarlin's Inc., 789 F.2d 98, 101 (2d. Cir. 1986)).

12. Citicorp has satisfied the two-part test to be applied to the Section 503(b)(1)(A) analysis. As to the first element, Citicorp's lease with the debtor was created before the bankruptcy petition was filed and the lease is not itself a post-petition transaction entered into with the estate. Practically speaking, however, the debtor entered into separate post-petition transactions with Citicorp each time its rent payment came due

and it decided to continue using the leased equipment (all the while relying on the automatic stay). Since the debtor chose not to reject its leases, but instead to continue under its obligations, the debtor was responsible for payments on each of these leases as the obligations became due each month. This post-petition acceptance of the leases is tantamount to a series of post-petition transactions entered into between the debtor and Citicorp.

As far as the second element, Daikan testified that the debtor used some of the leased medical equipment to provide post-petition medical services. This equipment therefore benefitted the estate as it allowed the debtor to continue to operate as a going concern.

13. The court finds that Citicorp is entitled to an administrative claim for the first fifty-nine days post-petition to the extent that some of the leased Citicorp equipment benefitted the estate. As detailed in the court's factual findings, Daikan's calculations revealed that \$390.17 per month or \$13.01 per day was attributable to post-petition use of equipment under Lease Number 0709860, \$152.62 per month or \$5.09 per day was attributable to post-petition use of equipment under Lease No. 0709861, and \$705.35 per month or \$23.51 per day was attributable to post-petition use of equipment under Lease Number

0943180. Therefore, Citicorp is entitled to an administrative claim in the amount of \$2,454.99 calculated as follows:

\$13.01 x 59 days =	\$767.59
\$5.09 x 59 days =	\$300.31
\$23.51 x 59 days =	\$1387.09
	+
	<u>\$2,454.99</u>

B. Citicorp's claim for an administrative expense under Section 365(d)(10).

14. Citicorp contends that it is entitled to an administrative claim for post-petition rent due under its four leases from August 4, 2000, until the date the leases were rejected, November 8, 2000. This is the "60+" period in which Section 365(d)(10) mandates that a debtor perform all obligations under its lease. The debtor agrees that it was obligated to perform its obligations under the leases as of August 4, 2001, but argues that the plain language of Section 365(d)(10) does not provide that a creditor is entitled to an administrative claim when a debtor does not comply with its rent obligations during this "60+" period. Notwithstanding the case law the debtor tendered to the court, the court finds that Citicorp's argument is the better reasoned approach.

15. Section 365(d)(10) provides that:

the trustee shall timely perform all of the obligations of the debtor, except those specified in section 365(b)(2), first arising from or after 60 days after the order for relief in a case under Chapter 11 of this title under an unexpired lease of personal property (other than personal property leased to an individual primarily for personal, family, or household purposes),

until such lease is assumed or rejected notwithstanding section 503(b)(1) of this title, unless the court, after notice and a hearing based on the equities of the case, orders otherwise with respect to the obligations or timely performance thereof.

16. Section 365(d)(10) was created as part of the Bankruptcy Reform Act of 1994 and is patterned after Section 365(d)(3), which applies to leases of nonresidential real property. Prior to the enactment of Section 365(d)(10), debtor-lessees of equipment had an unlimited amount of time to assume or reject leased commercial equipment. See In re Elder-Beerman Stores Corp., 201 B.R. 759, 761 (Bankr. S.D. Ohio 1996) (discussing history of this statute). Section 365(d)(10) is therefore designed to force a debtor-in-possession or a Chapter 11 trustee to decide whether to assume or reject commercial equipment leases after fifty-nine days from the order of relief. In the event that the debtor-in-possession or trustee wishes to have additional time beyond the fifty-nine days following the order for relief to make its decision, the debtor-in-possession or trustee has to petition the court for an extension of time or tender to the lessor all lease payments due under the lease. Thus, Congress adopted this section to "shift to the debtor the burden of bringing a motion to [assume or reject the lease] while allowing the debtor sufficient breathing room after the bankruptcy petition to make an informed decision." Id. (quoting 140 Cong.Rec. H10, 752-01 (daily ed. Oct. 4, 1994)).

17. Given Congress' legislative intent, the facts in the instant matter mandate that Citicorp is entitled to full payment of all post-petition rent due sixty days from the order of relief (August 4, 2000) until rejection of the leases on November 8, 2000 as an administrative claim. If the court did not give Citicorp an administrative claim for this "60+" lease arrearage, it would be reducing Citicorp's claim to an unsecured, non-priority claim worth cents on the dollar and rewarding the debtor for disobeying the clear strictures of the statute which clearly entitle a lessor to full payment. This would be a result demonstrably at odds with the language of the statute, and would effectively neuter Section 365(d)(10).

18. This conclusion is consistent with the "majority rule" in other bankruptcy courts that grant a commercial equipment lessor an administrative claim for rent owed during the "60+" period until assumption or rejection of the lease. See Collier on Bankruptcy, § 365.04[3](f) (2000). Moreover, this decision is consistent with decisions in the Eastern and Middle Districts of North Carolina and prior decisions in this District. See Southern Contractor's Equipment, Inc., (Case No. 97-16636C-7D) (Bankr. M.D.N.C. Nov. 12, 1999) (Stocks, J.); In re Eastern Agri-Systems Inc., 258 B.R. 352 (Bankr. E.D.N.C. 2000) (Leonard, J.); In re CSVA, Inc., 140 B.R. 116 (Bankr. W.D.N.C. 1992) (Wooten, J.) (deciding identical issue under Section 365(d)(3)).

19. Citicorp is accordingly due \$15,793.97 as rent accruing from the beginning of the "60+" period on August 4, 2000 until the lease rejection date of November 8, 2000. This computation is made as follows:

a) Equipment Schedule One required monthly payments of \$952.20, due on the 1st of each month (due 9/1/00, 10/1/00, and 11/1/00):

$$3 \times \$952.20 = \$2,856.60$$

b) Equipment Schedule Two required monthly payments of \$2,917.25, due on the 1st of each month (due 09/1/00, 10/1/00 and 11/1/00):

$$3 \times \$2,917.25 = \$8,751.75$$

c) Master Lease Agreement Two required monthly payments of \$918.46, due on the first of each month (due 09/1/00, 10/1/00, and 11/1/00):

$$3 \times \$918.46 = \$2,755.38$$

d) Master Lease Agreement Three required monthly payments of \$715.12, due on the ninth of each month (due 9/9/00, 10/9/00):

$$2 \times \$715.12 = \$1,430.24$$

$$+ \quad \underline{\hspace{1.5cm}} \\ \text{Total} = 15,793.97$$

C. Citicorp's claim for attorney's fees.

20. Citicorp claims it is owed legal fees totaling \$5,427.45, which includes two components: Citicorp incurred \$1,878.52 of legal services enforcing its rights under the leases following the debtor's bankruptcy petition but before the running of the "60+" period. These dates were from June 6, 2000 until August 4, 2000. Citicorp also claims legal fees of \$3,548.93 for enforcing its rights under its leases during the period in which Section 365(d)(10) obligated the debtor to perform timely all obligations under its leases. This period was from August 4, 2000 until November 8, 2000. Each of these components is addressed as follows:

a. Citicorp has requested an administrative claim for the legal fees it incurred while the debtor used the leased equipment to benefit the estate after the petition was filed, but before the commencement of the "60+" period. This claim must be denied. During the first fifty-nine days post-petition, the debtor is entitled to use leased commercial equipment, and the lessor should not incur substantial legal fees during this abeyance period other than incidental monitoring costs. These monitoring costs are not costs associated with any benefit to the estate, but instead relate to costs associated with Citicorp's rights as a creditor of the estate. "[L]egal services which are provided solely in order to benefit the client-as-creditor are not

compensable, even where they confer an incidental benefit upon the estate." In re Flight Transportation Corp. Securities Litigation, 78 B.R. 562, 564 (D. Minn. 1987), aff'd, 874 F.2d 576 (8th Cir. 1989). Legal fees appropriately accrue after the fifty-ninth day - - when Section 365(d)(10) entitles the lessor to compel the debtor to assume or reject the leases.

b. In this vein, Citicorp is entitled to its reasonable attorneys fees expended during its efforts to compel the debtor to assume or reject the lease following the fifty-ninth post-petition day. This amount, as demonstrated by Citicorp's February 6, 2001 Amended Proof of Claim, is \$3,548.93.

Section 365(d)(10) requires the debtor or trustee, after the fifty-ninth post-petition day, to perform "all the obligations of the debtor" from the leases. Reasonable attorney fees come within the ambit of compensable "obligations" under Section 365(d)(10). If Congress merely intended to restrict the debtor's "60+" responsibility to rent owed under its leases, the statute would have been narrowly tailored specifying that the debtor's only obligation under a lease was to pay rent due.

Significantly, the statute says that a debtor must perform all of its obligations under the leases, except those set-forth in Section 365(b)(2). Attorney's fees collectable under a lease provision are notably absent from the Section 365(b)(2) exclusion of the debtor's obligations under commercially leased equipment

during the "60+" period --suggesting that if Congress wished to make attorney fees an exclusion to the debtor's full obligations under the lease it would have naturally indicated this intent in this section. See, e.g., In re Pacific Sea Farms, Inc., 134 B.R. 11, 14-15 (Bankr. D. Hawaii 1991) (detailing Congress' legislative intent).

21. Citicorp's counsel evidently has not submitted a formal fee application pursuant to Section 506(b) and Bankruptcy Rule of Procedure 2016. However, Citicorp's February 12, 2001 Motion for Allowance and Payment of Claims included all the necessary and required information for a fee application and referenced Bankruptcy Rule 2016 in the text of the Motion's introductory paragraph. All parties due notice were served a copy of the Motion. After a court review of counsel's services and expenses submitted as Exhibit J in this Motion, the fee of \$3,548.93 is a reasonable amount and shall be deemed to sufficient to satisfy the requirements of a formal fee application.

D. Citicorp's entitlement to an unsecured, non-priority claim for the pre-petition lease arrearage.

22. Citicorp contends that it is entitled to an unsecured, non-priority claim for the balance of its lease rejection claim not given administrative priority treatment. Under the provisions of Section 365(g) and Section 502(g) of the Code, which govern rejection of executory contracts and leases, Citicorp is entitled

to an unsecured, non-priority claim of \$163,439.19. This amount is calculated as follows:

- \$187,115.60 (lease rejection claim as set forth in Amended Proof of Claim filed on February 6, 2001, including all attorney's fees);
- \$1,878.52 (portion of February 6, 2001 lease rejection claim for post-petition legal fees incurred prior to running of "60+" period, which is non-payable to Citicorp pursuant to Paragraph 20(a) of this Order);
- \$3,548.93 (payable as administrative claim for attorney's fees under Section 365(d)(10), pursuant to Paragraph 20(b) of this Order);
- \$2,454.99 (payable as an administrative claim under Section 503(b)(1)(a), pursuant to Paragraph 13 of this Order);
- \$15,793.97 (payable as administrative claim under Section 365(d)(10), pursuant to Paragraph 19 of this Order);

TOTAL = \$163,439.19

It is therefore ORDERED that:

a) this Amended Order supersedes and replaces the court's Order of April 26, 2001;

b) Citicorp is entitled to a administrative claim under Section 503(b)(1)(A) for \$2,454.99;

c) Citicorp is entitled to an administrative claim under Section 365(d)(1) for \$15,793.97;

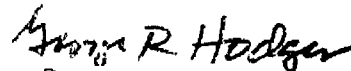
d) Citicorp is entitled to an administrative claim under Section 365(d)(10) for its attorneys fees in the amount of

\$3,548.93, payable without the further submission of a fee application under Bankruptcy Rule 2016;

e) Citicorp's claim for administrative expense for attorney's fees in the amount of \$1,878.52 is denied; and

f) Citicorp is entitled to a non-priority, unsecured claim under Section 365(g) and Section 502(g) in the amount of \$163,439.19

SO ORDERED.


Dated as of date entered

George R. Hodges
United States Bankruptcy Judge